IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-781

PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL,
Petitioners,

v.

THE ARLINGTON COUNTY BOARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Petitioners Pentagon City Coordinating Committee, Inc., John H. and Joan C. Quinn, D. Derk Swain, Richard J. and Deborah Herbst, and Robert F. and Calista L. Steadman request that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinion and order of the Circuit Court for Arlington County (of Arlington County, Virginia) are

not reported but appear in Appendix A to this petition. The orders of the Supreme Court of Virginia denying an appeal and denying a petition for rehearing are set forth in Appendix B.

JURISDICTION

The order of the Supreme Court of Virginia denying petitioners' timely petition for rehearing was entered on September 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

This case presents a novel question of procedural due process arising out of the duty of a state zoning body to consider and weigh the various public welfare factors affecting a specific rezoning proposal and to reach a rational balance as among those factors. The precise question presented is as follows:

Where a state zoning body is considering whether to authorize the "high-rise development" of a large urban tract of land in a way which will have a direct adverse impact upon the property, property values, and health of neighboring residents, and where the zoning body has been forewarned by a sister governmental agency and nearby property owners that the proposed development will cause an apparently insoluble public welfare problems of unmeasured dimensions (in terms of traffic, pollution, and declining property values), may that zoning body properly approve the proposed development without undertaking to ascertain the dimensions of the public welfare problem involved—or does such approval deprive the adversely affected property owners of procedural due process in violation of the Fourteenth Amendment?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 25, 1976, the County Board of Arlington County, Virginia, rezoned a large centrally-located tract of land within the County. On June 3, 1976, these petitioners filed suit in the Circuit Court of Arlington County, Virginia, seeking a declaratory judgment to the effect, *inter alia*, that the County Board's decision had violated petitioners' rights under the Fourteenth Amendment. At the conclusion of the trial the trial court dismissed all of petitioners' claims, and the Supreme Court of Virginia denied an appeal.

Although the trial record is substantial, the factual predicates for petitioners' constitutional claim are virtually undisputed. As further demonstrated below, the issue raised by the present petition for certiorari is purely a legal issue which can readily be resolved by this Court. The relevant undisputed facts are as follows:

(1) Arlington County, Virginia, lies on the southern shore of the Potomac River, and, as a central part of the Greater Washington Area, has been the subject of

intense high density real estate development. Among the prominent high density developments within the County are the Rosslyn Circle development and the Crystal City development, with other major projects scattered in between. (*See, e.g.,* PX 6 at 8; PX 10 at 10; PX 4 at 2-3).[1]

(2) The last large undeveloped tract of land within Arlington County is a 116-acre tract known as "the Pentagon City tract", which lies southwest of the Pentagon Building, the headquarters of the U.S. Department of Defense. (PX 6 at 8).

(3) To the west of the Pentagon City tract is a single-family residential neighborhood known as "the Arlington Ridge neighborhood". According to a report approved by the Arlington County Board, the Arlington Ridge neighborhood has been seriously impacted by the high density development that has already occurred within the County. According to the report,

> "The principal threat to the Arlington Ridge residential neighborhood . . . comes from the impact of high density redevelopment, or commercial activities mostly along the outer perimeters of the area. *Excessive traffic, commercial parking, noise, pollution, and sometimes proximity to high-rise buildings have reduced desirability for single-family use and encouraged home sales . . . .*" (PX 4 at 8, emphasis added).

Thus the respondent here, the Arlington County Board, has recognized that the high density of the

[1] The abbreviation "PX" refers to exhibits offered by petitioners at the trial. References to Roman numerals are to the indicated volume of the trial transcript.

Pentagon City tract will have a direct adverse impact upon the property values of these petitioners, all of whom are residents of the Arlington Ridge neighborhood.

(4) In late 1975 the owners of the Pentagon City tract submitted to the Arlington County Board an elaborate proposal for rezoning the tract to allow the construction of a huge physical plant, including a series of 22-story buildings with a vast physical capacity. As finally approved by the Board, upon completion in 1990 the development will encompass 1,250,000 square feet of office space, 2,000 hotel rooms, an 800,000 square foot shopping center, 6,200 apartment units, and a 300-bed nursing home. (PX 2).

(5) In submitting their proposal the owners were required to, and did, submit a technical traffic engineering study as to certain aspects of the traffic conditions which would exist on the tract when construction had been completed in 1990. (PX 10 at 50). That study showed, without dispute, that at three specific traffic intersections on the tract "jammed traffic conditions" would occur in both the morning and evening rush hours, with resulting "back-ups" or queues of vehicles which might potentially affect the entire traffic network of the area. (XXIII at 24-26; PX 11 at 130). Since the report did not undertake to analyze the effect of those queues of vehicles on the area traffic network, there was no analysis of what the total traffic picture would be upon completion of the proposed development. (XIII at 135-36).[2]

[2] The report analyzed each intersection as though it would exist entirely independent of the rest of the traffic system. (Id.). Although it would have been perfectly feasible (as subsequently

(6) Recognizing its own inexpertise with respect to traffic problems, the Arlington County Board has created a special agency, the Arlington County Transportation Commission, to advise the Board on the traffic consequences of proposed developments. (PX 14; IV at 19). That commission reviewed the Pentagon City developers' traffic engineering study while the developers' proposal was pending before the Board, and the Commission then reported to the Board as follows:

> "No [development plan] for Pentagon City should be approved by the County Board because *no reasonable assurance presently exists that severe traffic congestion in the development area can be avoided.*" (PX 17; VI at 32; emphasis added).

In other words, judging simply by the developers' incomplete traffic analysis, the Commission foresaw the possibility of an unacceptable level of area-wide traffic congestion and warned the Board that it should not authorize development of the tract until further investigation might provide some reasonable assurance that the problem could be solved. Various citizens and citizens associations gave similar warnings to the Board.

(7) Although the Arlington County government employs a number of traffic engineers, neither those staff engineers nor the developers' own traffic consultant made any effort, prior to the Board's approval of the developers' proposal, to analyze the "back-up" relationships between the intersections and thus to assess

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demonstrated at the trial) for a trained traffic engineer to analyze the inter-relationships as among the intersections and thus present a complete traffic picture (see, e.g., PX 31; PX 33), the report did not do so.

the severity of the traffic jams that would exist on the tract as a whole. (XVII at 24; XIII at 135-36). Thus, when the Board approved the proposal on February 25, 1976, it had made no effort to evaluate or understand the reasonably foreseeable traffic consequences of its action.

(8) Before it reached its decision the Board was also clearly forewarned of the possibility that the traffic congestion which would be created by the new development would in turn result in dangerous levels of air pollution, and the Board was also advised of the need for a scientific examination of the air pollutional consequences before the project could safely proceed. (PX 44 at 2). But instead of making such an investigation the Board approved the development and *immediately thereafter* voted to establish a new task force to study such air pollutional problems in the future. (PX 7). Here again, therefore, the Board approved the project without bothering to evaluate or understand the consequences of its action.

(9) The developers in this case contend, perhaps properly, that under the law of Virginia the Board's action of February 25, 1976, conferred upon the developers a vested right to proceed in accordance with the Board's approvals of that date. (Intervenors' Answer to Interrogatory No. 7).

(10) In their petition for a declaratory judgment in the trial court below these petitioners stated the following constitutional claims:

> "32. Under the Fourteenth Amendment to the Constitution of the United States, the defendants on February 25, 1976, had an affirmative legal duty, prior to promulgating the zoning ordinance requested by the developers, to make a rational

assessment of the degree to which that ordinance (and consequent development of the Pentagon City tract) would impact upon the plaintiffs' rights to enjoy their property and existing public facilities free of unjustifiable interference.

"33. The Board's decision of February 25, 1976, constituted a violation of the foregoing constitutional duty in that the Board failed to make a rational evaluation of the degree to which the plaintiffs and other members of the public would be adversely affected by traffic congestion on the public highways in and around the Pentagon City tract and by environmental pollution of the neighborhood within which the plaintiffs reside."

(11) In support of the foregoing constitutional claims the petitioners adduced clear expert testimony demonstrating by statistical analysis that the queues of vehicles which would be "backed up" at three intersections on the tract would reach lengths of more than a mile and would thus back up into and "jam" virtually all of the major traffic intersections in the area, including those within the tract and those at which the tract's internal street system connects with the surrounding highway network. (See, *e.g.*, PX 31; PX 33; V at 36-37). Although the Board and its staff could have made the studies necessary to see the full traffic picture, they did not do so prior to approving the developers' proposal.

(12) To illustrate the severity of the traffic conditions that will exist on the tract, there was uncontradicted expert testimony that during the morning and evening rush hours vehicle speeds in the affected area will routinely be reduced to approximately 1 mile per hour, with staggeringly long waits simply to get through the affected intersections. (See, *e.g.*, V at 39-44, 48-49).

(13) None of the witnesses at the trial, including the witnesses called on behalf of the Board and the developers, could identify any method for eliminating or alleviating the total "breakdown" in the traffic system which is so clearly indicated by the trial evidence. (II at 26). Judging by the present record, there simply is no way to avoid such a "breakdown" if the Board-approved Pentagon City project goes forward.

(14) With respect to air pollution, the trial record shows, *inter alia*, (a) that "photochemical oxidants" created by vehicle emissions are dangerous to human health (VII at 90); (b) that today photochemical oxidants have already reached dangerous levels in the area (XXI at 71-72, 76); (c) that in 1990, even if strict automobile emission control programs are instituted, there will be a dangerous photochemical oxidant condition in the region in 1990, whether or not the Pentagon City development is constructed (XVI at 23, 137); (d) that if the proposed high-density development goes forward on the Pentagon City tract, resulting in "jammed" traffic conditions in the area, the project will seriously exacerbate the situation in terms of human health (VII at 108-109); and (e) that each of these propositions was literally undisputed at the trial. Although the Board was warned that the possibility of such air pollutional conditions should be scientifically investigated (PX 44 at 2), it quite consciously and deliberately decided to postpone any investigation until after it had approved the Pentagon City project. (PX 7).

(15) With all due respect to the trial judge, his opinion reflects a plain misunderstanding of the record with respect to the proceedings before the Board and the nature of the traffic and air pollutional problems

which the Board failed to investigate. The opinion's handling of those two problems was, in sum, as follows:

(a) The trial judge treated the traffic problem as though the Board itself had heard expert testimony indicating that jammed traffic conditions would *not* result from the Pentagon City development. The trial court's opinion states flatly as follows:

> "When qualified exports are in genuine disagreement in their forecasts of [traffic] conditions in 1990, then for the county board to accept one view or the other is neither arbitrary nor capricious." (App. A at 8a).

It is truly indisputable, however, that during the Board's hearings there was no "disagreement" among any traffic "experts"; in fact, only one such "expert" presented a traffic "forecast" to the Board, and he was the developers' traffic engineer, who was forecasting traffic jams at only three points (without analyzing their effects). Thus the trial court not only misunderstood what had transpired before the Board but also missed the essential point that the Board had failed to make any reasonable investigation of the total traffic picture.

(b) The trial court's reasoning with respect to the air pollutional issue was similar. On that subject the opinion made two points. First, it was stated that "reasonable men may differ" as to whether there will be dangerous photochemical oxidant levels on the tract in 1990 (App. A at 4a)—as though, again, the Board had heard conflicting testimony and had considered and resolved the issue. In fact, there was no such difference of opinion before the Board, and the Board quite consciously declined to consider the issue at all,

deciding instead to approve the project immediately and consider its air pollutional consequences only when it would be too late to make any difference.

Secondly, the trial court's opinion suggested that "man's knowledge" of photochemical oxidant pollution is not complete and that the proposed project should not be delayed because of any worries on that score (App. A at 4a). That suggestion, however, completely overlooks the undisputed scientific trial evidence showing that the projected traffic jams on the Pentagon City tract are bound to exacerbate a photochemical oxidant situation which would be dangerous in any event (see p. 9, *supra*). The latter fact would have been quickly discovered by the Board if it had undertaken even a cursory investigation of the problem.

(16) Following the trial court's denial of their petition for a declaratory judgment, petitioners filed a timely petition for leave to appeal to the Supreme Court of Virginia. The petition asserted the Federal constitutional claims raised in the trial court, but the petition was summarily denied on July 28, 1977. A timely petition for rehearing was summarily denied on September 2, 1977.

ARGUMENT

As a threshhold factual matter it is clear that the challenged decision of the Arlington County Board will have a direct adverse impact upon the property interests of the present petitioners and that the petitioners are therefore in a position to present the constitutional claims here asserted.

The facts on this score are simple. As a general matter the United States Congress itself has expressly

found "that the growth in the amount and complexity of air pollution brought about by urbanization . . . and the increasing use of motor vehicles has resulted in mounting dangers to the public health and welfare . . . [and] damage to and the deterioration of *property* . . . ."[3] But more importantly, in this case the respondent itself, the Arlington County Board, has verified the fact that a high-rise development adjacent to the neighborhood in which these petitioners live will have the direct result of reducing the desirability of the neighborhood, encouraging home sales, and thus depressing the values of the properties of these petitioners (see p. 4, *supra*). Since the property rights of the instant petitioners are fully as deserving of constitutional protection as the property rights of (for example) the owners of the Pentagon City tract, we can turn immediately to the question whether the Arlington County Board in this case afforded petitioners procedural due process.

This Court has made clear in a series of zoning cases that it is the function of a zoning body, when considering a specific zoning proposal, to weigh the various factors for and against the proposal in the light of the public welfare. Where the zoning body has engaged in this weighing process and reached a conclusion about which reasonable men may differ, then it is said that the zoning result is "fairly debatable" and must be judicially affirmed. *See, e.g., Village of Euclid, Ohio* v. *Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Conversely, where the zoning decision is one which no reasonable man could have reached and is thus not "fairly debatable", then due process requires that the decision

[3] 42 U.S.C. § 1857(a)(2) (emphasis added).

be set aside as bearing no "rational relationship to permissible State objectives." *Moore* v. *City of East Cleveland, Ohio*, —— U.S. ——, 97 S.Ct. 1932, 1935 (1977).

Implicit in this reasoning process are the clear dual premises (1) that every state zoning body has an affirmative duty to weigh the various factors, pro and con, and reach its own decision as to where the public welfare lies, and (2) that it would be constitutionally improper for such a body either to refuse to consider the various factors or to promulgate a zoning decision without having done so if private property interests would be adversely affected thereby. To hold otherwise, we submit, would be to say that a state instrumentality can deprive a person of property without affording him procedural due process.

The point is illustrated by the case of *Citizens Association of Georgetown, Inc.* v. *Zoning Commission of D.C.*, 155 U.S. App. D.C. 233, 477 F.2d 402 (D.C. Cir. 1973). There the court undertook to decide, consistent with the prior decisions of this Court, whether a challenged zoning decision had a "substantial relationship to the public welfare", but from the record in that case it was unclear whether the zoning body had considered one of the possible factors affecting the public interest, namely, the environmental impact of the challenged decision. The court stated as follows:

> "Where, as here, the potential environmental effects of the Commission's decision are substantial, *it must at least consider* the environmental issue to fulfill its *public interest mandate*. The judgment as to environmental impact is a determination of policy committed to the discretion of the Commission alone; and where the Commission

> has *struck a balance* between environmental and other factors, we will not reverse its decision simply because we would have attached different *weights* to the competing interests at stake." 233 U.S. App. D.C. at 241, 477 F.2d at 410.

Similarly, in considering whether zoning bodies have acted arbitrarily and capriciously, the state courts appear to be unanimous in the view that every such body has a duty "to consider the effect" of the proposed development in terms of any potential public welfare problems brought to that body's attention. See, *e.g., Vece* v. *Zoning and Planning Commission,* 148 Conn. 500, 172 A.2d 619 (1961); *Brandon* v. *Board of Commissioners,* 124 N.J.L. 135, 11 A.2d 304 (1940); *Price* v. *Cohen,* 213 Md. 457, 132 A.2d 125 (1957).

The foregoing reasoning, not to mention common sense, leads inevitably to the conclusion that where a zoning body has been told that a particular zoning proposal is likely to have a serious, but as yet unmeasured, adverse impact upon the public welfare and private property rights, the zoning body may not properly approve the proposal without having "at least considered" and to some extent evaluated that impact. Otherwise a zoning body would be free simply to ignore both the public welfare and affected private property rights—and that simply cannot be consistent with the Due Process Clause.

We submit that it is self-evident that this issue is one of enormous potential importance for American society. Congress itself has recently recognized the obvious fact that, as urbanization and urban congestion proceed apace, the "land-use and transportation controls" formulated by state zoning bodies throughout the country are bound to have a major impact upon

the quality of American life in the future,[4] and we respectfully submit that it is time for this Court to make clear that in this field of governmental activity there is at least one minimal protective procedure which is required by the Fourteenth Amendment—namely, that when a zoning body has been alerted to the fact that a proposed development may lead to a potentially serious public welfare problem having a direct effect on private property rights, that zoning body has a duty to evaluate and "at least consider" the consequences of what it is being asked to approve before it acts.

We also submit that the present case is a proper vehicle for announcing this fundamentally important principle. Here a public agency with particular expertise in a relevant area (traffic) warned the zoning body that further investigation would be essential before anyone could say whether the specific zoning proposal would lead to a public welfare catastrophe or not—and yet the zoning body refused to take any reasonable step in that direction. Just as one example of what might have been done, the Board could easily have had its professional staff of traffic engineers do a statistical analysis of the impact which the projected "jammed conditions" at three intersections on the Pentagon City tract would have on the rest of the traffic system—and if such a statistical analysis had been made, the Board would have become aware that the proposed development would result in a total "breakdown" of the traffic system in the area. (II at 26). Moreover, if one proceeds on the assumption (as we do) that the members of the Arlington County

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[4] 42 U.S.C. § 1857c-5(a)(2)(B).

Board would have reacted rationally to that news, it seems at least highly probable that in the face of such a statistical analysis the Board would have rejected the specific development proposal put forward by the developers and directed them to go "back to the drawing board" to reformulate their plans in such a way as to alleviate the problems which they were proposing to create. But however that may be, the simple fact remains that in this case the zoning body did not perform the weighing or balancing function that must be performed if the property interests of those affected by a proposed zoning decision are to be procedurally protected.

The same point is even more clearly illustrated by the air pollution issue in this case. Not only did the Board not undertake an investigation of the matter before acting; it affirmatively decided to postpone any analysis of the problem until after its zoning decision had been made and the owners of the property had laid claim to a vested affirmative right to build the proposed project without regard to its pollutional consequences. We respectfully submit that the present record presents a suitable vehicle for advising state zoning bodies throughout the country that it is procedurally unfair and constitutionally impermissible to act first and consider the consequences later.

Finally, we should emphasize that the holding for which we contend is relatively narrow. If the Board in this case had made some reasonable investigation of the total traffic picture and the air pollutional problems involved and (in the words of the *Georgetown* case, *supra*) had then rationally "struck the balance" in *favor* of the developers' proposal, the constitutional claim asserted here would never have arisen. But that

is simply not what happened. The Board in effect abdicated its responsibility to consider and weigh and strike the balance among the various public welfare factors and property interests involved, and in so doing it denied procedural due process of law to the neighboring property owners whose property rights will be directly affected by the challenged decision.

CONCLUSION

Since this case presents a novel but serious question which has important implications in terms of urban development throughout the country, the present petition for a writ of certiorari to the Supreme Court of Virginia should be granted.

Respectfully submitted,

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December 1, 1977

APPENDIX

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PENTAGON CITY COORDINATING COMMITTEE, INC., et al.
Plaintiffs

v.

ARLINGTON COUNTY BOARD, et al., *Defendants*

In Chancery No. 26423

Memorandum

FROM: HONORABLE PAUL D. BROWN, *Judge*

TO: RALPH BOCCAROSSE, JR., Esquire, *Counsel to Plaintiffs*
GARY L. REBACK, Esquire, *Counsel to Plaintiffs*
ROBERT B. OWEN, Esquire, *Counsel to Plaintiffs*
CHARLES G. FLINN, Esquire, *Counsel to Defendant County Board*
MARC E. BETTIUS, Esquire, *Counsel to Intervenors*
WILLIAM B. LAWSON, Esquire, *Counsel to Intervenors*

This comes upon an Amended Petition for Declaratory Judgment brought, as of trial date, by seven individuals* who live in the general area of the subject property. The Court is asked to declare null and void a zoning action of

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* The Plaintiffs are only named in the caption of the original Petition. It is undisputed that they are: John and Joan Quinn and Richard and Deborah Herbst, all of the 2200 Block of South Knoll Street, D. Derk Swain of 2300 South June Street, and Dr. and Mrs. Robert F. Steadman of Apt. A711, at 1111 Army Navy Drive. The Steadman's apartment is directly across from the subject premises. The remaining Plaintiffs live at or close to South 23rd Street about one half mile from the subject land.

Pentagon City Coordinating Committee, Inc., was heretofore struck as a Plaintiff when it appeared its membership included persons without a sufficient legal interest in the issues.

the County Board of Arlington County of February 25, 1976, together with the approval of Part I of a Phased Development Site Plan, as having been passed and approved arbitrarily and capriciously.

In granting in part a Motion to Strike at the end of Plaintiffs' case, the Court has decided against the Plaintiffs' contention that the County Board failed in a gross manner to consider the zoning. The same ruling denies the Plaintiffs' contention that the governing body was unable to exercise free choice whether to change the zoning or not because of legal advice it was thought to have received.

The heart of the complaint is that the zoning was arbitrary and capricious because it created problems of air pollution and automobile congestion.

The subject property is some 116 acres in size. It lies across Interstate 95 from the Pentagon building. It is the last tract of land anywhere near its size available for development in the Jefferson Davis Highway corridor.* The Metro subway under construction has a curve in its line with a stop for this land as part of the 1968 plan of the Washington Metropolitan Area Transit Authority. The corridor is that portion of Jefferson Davis Highway (U.S. 1) from Interstate 95 south to an access road across railroad tracks. The access road leads to Washington National Airport.

Statutory standards for consideration in zoning legislation are set forth in Code sections 15.1-427, 15.1-489 and 15.1-490.

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* Another area which may be developed under the name "Airport City" was considered by all experts in computing the future generation of traffic. Photographic exhibits suggest major problems because of the railroad lines of the R. F. and P. owners.

The Court has had the benefit of twelve days and two evenings of testimony with a large number of detailed exhibits and of a one-and-one-half hour view by car of the area involved.

The issue is not whether the Court favors or does not favor the building of the proposed "Pentagon City". The issue is whether the County Board in enacting the zoning legislation acted in a manner which was clearly unreasonable, arbitrary or capricious and without reasonable or substantial relation to the public health, safety, morals or general welfare. A further legal principle involved is that: "The Court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable, it must be sustained." *Fairfax County* v. *Allman*, 215 Va. 434 (1975).

The Court finds that the reasonableness of the zoning and site plan action was clearly debatable. Accordingly, it is sustained and the prayers of the Petitioners are denied.

In reaching this conclusion, the Court decides that the Plaintiffs, or some of them, are sufficiently situated as occupants and landowners of the subject premises that they have a right to raise the complaint herein made without being limited, as the County says, to a right to complain only of spot zoning.

The plaintiffs have not proved in terms of dollars that their specific property interests will be harmfully affected by the increased traffic. Assuming, but not deciding, as regards traffic, that the Plaintiffs have a right to complain of congestion at the borders of the zoned land as distinguished from at their own residences, a further examination will be made of this contention.

As regards pollution, while noise pollution was alleged no evidence was proferred in this area. As to air pollution, complaint is pinpointed as to two of five major categories of air pollutants, namely, carbon monoxide and photochemical oxidants.

As regards carbon monoxide, the evidence shows the greatest danger to be in close proximity (two meters) to the auto exhausts. No evidence shows a direct level or effect of these fumes at the homes of the Plaintiffs. Witness Biggs, a meteorologist, does predict excessive levels by 1990. In any event, the evidence shows further that the State Pollution Control Board will require under any development of the subject property, at the building permit issuance stage, a showing that certain levels of carbon monoxide pollution will not be exceeded. While the County Board does not have to rely on this control, nevertheless it may and still act reasonably.

Photochemical oxidants are complex in nature. Motor vehicle exhaust emissions combine in the air with other things and under further conditions of temperature, humidity and sunlight merge and interact to product the polluting oxidants. This type of pollution is an area one in terms of many miles and the evidence is that some causes may be as much as 100 miles away. No State or local standards were shown to exist limiting the creation of the element of photochemical oxidants which comes from motor vehicles. It has been shown that the Federal Government, through its Environmental Protection Agency, has established standards of air purity. The Plaintiffs produce evidence that these will be violated in what is called the "horizon year". The horizon year in this case is taken to be approximately 1990 and is that year in which, if zoning is sustained and building proceeds as expected, the last of contemplated construction will have been finished. Evidence on behalf of the Defendant Board and intervening property owners is to the contrary. First, reasonable men may differ as to whether this pollutant will violate standards in the horizon year. Secondly, the Plaintiffs have been unable to show that man's knowledge of this kind of pollutant as of the zoning date was such that the zoning of a thirty two million dollar property should be delayed for a year or more to the end that background levels could be

determined and the possibility of future harmful effect more accurately known. On the evidence presented the Court finds that the state of the art at the time was insufficient to mandate the denial or long delay of the requested zoning and site plan.

A study compared the traffic generation if this property were located off a Metro station as against the existing facts. If the assumption is accepted that growth will occur somewhere, then the study shows that there would be fifteen percent more traffic generated off a Metro line with increased congestion and pollution implications.

The complaints of air pollution must fail.

Turning to the issue of traffic congestion: This is clearly one of the proper and necessary concerns in zoning actions. The complaint pinpoints three intersections and asserts there will be intolerable congestion in the horizon year to the point that, it is argued, the passage of the zoning change was arbitrary and capricious. One intersection involves Hayes Street at Army Navy Drive, a border intersection which apparently will never be developed north of Pentagon City and part of which becomes two ramps which enter I-95 southbound. Two other intersections are on Eads Street at 15th, a border of the property, and Eads Street at 18th Street, one long block out of the property.

Where U.S. 1 continues at grade at present or where it may become an elevated road to be known as Interstate 595, there will be no provision for traffic to make a left turn from I-595 to go southbound into Virginia at I-95. It will simply feed due north towards the Pentagon and Rosslyn, or towards the District of Columbia. Therefore, the large volumes of traffic generated by a row of three developments east of U.S. 1, the National Center, Crystal City and Jefferson Plaza, together with the possible "Airport City" east of them will have to send much of their southbound traffic over 15th and 18th Streets and through Pentagon

City to reach I-95. Other vehicles will travel south on U.S. 1 (I-595) where some of them now turn right and will use 23rd Street south through the area of the homeowner Complainants. Still other traffic will continue to go south to Glebe Road where it commences on the right and eventually crosses southbound I-95 at another interchange.

To restate the situation, existing and possible future development will send much traffic through Pentagon City to the end that sixty percent of the traffic on its streets and border intersections will have been generated elsewhere. Even with the opening of 12th Street South through the subject land and with major highway changes and improvements to State urban standards, a traffic report known as the Pratt Report, prepared in connection with the *proposed* zoning, showed that at three of the intersections an "F" level of service would obtain at the three intersections in the workday morning and evening peak hours only. (Exhibit P-10A, p. 30) The excess percentage projected varied from two to thirteen percent above the rated maximum capacity of each intersection. A Pratt restudy *as zoned* shows internal traffic generation down for in and out load at peak hour of twenty one percent and eighteen percent. The result is muted by external traffic of sixty percent or more. (Exhibit D-10)

The experts have disagreed as to what conditions obtain when an 'F" level of service is reached.* Qualified

* An E level of service becomes an F level when 100% of rated capacity is passed. A small excess would exhibit little difference from an E level of service. A large excess could mean totally jammed conditions. See the Highway Capacity Manual, Exhibit P-11, p. 80-81 and p. 129-131. One witness points to an intersection working adequately at Key Bridge over the Potomac at 166% of its rated capacity. No method exists to measure the "damping effect" caused by drivers' knowledge of heavy traffic at given intersections. This effect causes drivers to find alternate routes. It is well known to traffic engineers but depends on the availability of alternate routes.

experts disagree in this case as to whether any F levels will be reached. For example, Pratt notes that he was required to assume that all new traffic would be kept away from existing residential areas, placing greater volumes on the subject property. He notes further constraints on his study which raised the projection of volume of traffic more than he felt was reasonable. The County Highway Engineer does not anticipate F levels will exist and points to four existing intersections generally comparable in size and loads, as evidence that his opinion is correct. On the other hand, the Complainants produce three experts who say the level of congestion will range from 122% to 157% higher than intersection capacity in one direction at one of the two peak hours per workday. They argue that a premise of Traffic Engineer Pratt that for capacity purposes only one intersection should be classified "central business district" as opposed to some less densely settled district. The result, under Exhibit P-11, a Highway Capacity Manual much used in the field, would throw into the computations the numeral 1.25 as compared to the numeral 1, with the result that the Pratt forecast would have to be increased by twenty five percent. The Complainants say that the Pratt figures, as adjusted for less density after adoption of the zoning, must nevertheless be increased by twenty five percent to show the true problem which they believe is certain to exist in the horizon year. The County and intervening property owners respond that the site plan reduces "friction" by off street loading, etc., in a manner unknown to the 1965 Highway Capacity Manual and that even if an F level of service is reached there are things which can be done to alleviate the condition. For example, Eads Street can be made a through street parallelling U.S. 1 not only to Glebe Road but also further south across Four Mile Run to a major road in the City of Alexandria.

Thus, the experts disagree as to the premises undergirding the projections of how much traffic there will be.

They disagree as to the conclusions of how much traffic congestion will result. They disagree as to whether remedies will be available. When qualified experts are in genuine disagreement in their forecasts of conditions in 1990, then for the County Board to accept one view or the other is neither arbitrary nor capricious.

The evidence shows the County has a conscious policy to place high density development close to Metro stops and to retain other areas for low density residential uses. This is common sense. Demands for growth are met. In the county as a whole there is less pollution and traffic congestion from the growth. Metro is better used with the prospect of lower taxation of the citizens for operating subsidies.

The subject tract has a history of high density zoning. Because site plan approval has as great an impact as the act of zoning, the Court can only give its net impression of the changes. The property went from high density zoning through an application for a still higher density zoning. The County Board cut back the request so that the net result was, relatively speaking, a minor increase in density. For example, the applicants sought two million square feet of office space and were granted 1.25 million. Their request for hotel-motel units was increased. One effect was to reduce the rush-hour traffic densities. A simplified comparison of the changes is found in Exhibit D-10.

The Defendants point to a 1976 report of the National Capitol Region Transportation and Zoning Board of the Metropolitan Washington Council of Governments (an agency created by the various jurisdictions of Washington, D.C., and environs) which shows that in the year 1992 in the area fifty percent of all vehicle miles travelled will be at capacity levels "E" or "F". They note that while vehicle miles include open highway mileage, the area is nevertheless urban and that intersections will be

the cause of most of this expected problem. Thus they say that the most pessimistic forecast for Pentagon City at its three busiest intersections is no worse than the forecast for half the general Washington, D.C., area, even after various alternative traffic and Metro improvements estimated to cost 5.3 billion dollars have been calculated into the dismal area forecasts.*

Finally, the positive aspects of the total zoning and site plan approval for the citizens of the County generally were summarized primarily by witness Dewberry:

There will be less pollution and congestion with balanced development with development at this Metro location as opposed to a non-Metro location.

The needs for growth and for an increased tax base are further met.

The increase in density was minimal in the light of the value of concessions of the property owners.

A coordinated development of 116 acres at one time will now occur so that all utilities and streets ultimately needed will be supplied by block face as the first building is constructed in the block. Problems found in the development of the Rosslyn area of Arlington will be avoided or minimized.

All parking will be off street, as will be commercial loading and unloading. This reduces "friction" and achieves higher traffic volume capacity.

A new street will be opened—12th Street. Blocking Hayes Street and creating a sharp angle in Joyce Street will restrict traffic flows into single family residential areas.

The developers will donate twelve acres for a park.

---

* Oddly, as a witness noted, the worse traffic congestion becomes, the more Metro will be used.

Low-rise development buffers existing residential areas.

Portions of the site for a library and fire station have been donated by the developers.

The zoning is consistent with the land use plan, the Jefferson Davis corridor plans, the policy of the County as to development at Metro sites and with the history of zoning of the site.

The zoning is not all CO as was Rosslyn and Crystal City.

The rearrangement of the location of commercial, office and residential uses improves the use of the Metro station.

A nursing home will be developed.

Some housing for the elderly will be developed.

Some townhouse family development will occur.

The zoning is less intense than the rezoning with site plan approval of the adjacent Stone and Davy tracts concurrently approved.

No displacement of population will occur.

Site plan approval carried 60 conditions including such further matters as minimum ten foot pedestrian corridor access radiating through the blocks around Metro, and tree plantings along the streets.

Overall the zoning action has not been proved to be arbitrary and capricious. The result is to sustain the action of the County Board and to deny the prayers of the Amended Petition for Declaratory Judgment. Prevailing counsel should prepare a Decree for endorsement and presentation for entry.

_____

Judge

December 23, 1976.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL,
Plaintiffs,

v.

ARLINGTON COUNTY BOARD, ET AL., *Defendants.*

In Chancery No. 26523

Order

THIS CAUSE came on to be heard on the 15th day of November, 1976, upon the Plaintiffs amended petition for declaratory judment, upon the pleadings previously filed, upon the exhibits submitted and received in evidence, upon the court's hearing of testimony *ore tenus* and upon written and oral arguments of counsel for the Plaintiffs, the Defendant intervenor landowners, and the Defendant Arlington County Board.

After mature consideration of all of the aforesaid matters, the court is of the opinion as stated in the 12 page *Memorandum* dated December 23, 1976, that the zoning action of the Arlington County Board of February 25, 1976, complained of by the Plaintiffs, has not been proved to be arbitrary and capricious, and it is therefore

ORDERED, ADJUDGED and DECREED that the amended petition for declaratory judgment is denied with prejudice.

THIS ORDER IS FINAL.

ENTERED this 7th day of January, 1977.

PAUL D. BROWN, *Judge*

WE ASK FOR THIS:

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APPENDIX B

CORRECTED COPY

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday, the 28th day of July, 1977.

The petition of Pentagon City Coordinating Committee, Inc., John H. Quinn, Joan C. Quinn, D. Derk Swain, Richard J. Herbst, Deborah Herbst, Robert F. Steadman and Calista L. Steadman for an appeal from an order entered by the Circuit Court of Arlington County on the 7th day of January, 1977, in a certain declaratory judgment proceeding then therein depending, wherein the said petitioners were plaintiffs and Arlington County Board and others were defendants, having been maturely considered and a transcript of the record of the order aforesaid seen and inspected, the court being of opinion that there is no reversible error in the order appealed from, doth reject said petition, and refuse said appeal, the effect of which is to affirm the order of the said circuit court.

Record No. 770610

A Copy,

Teste:

Howard G. Turner, *Clerk*
By: /s/ ALLEN L. LUCY,
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 2nd day of September, 1977.

Record No. 770610

PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL.,
Appellants,

against

ARLINGTON COUNTY BOARD, ET AL., *Appellees.*

Upon a Petition for Rehearing

On mature consideration of the petition of the appellants to set aside the decree entered herein on the 28th day of July, 1977, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ HOWARD G. TURNER, *Clerk*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-781

PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL,
Petitioners,

v.

THE ARLINGTON COUNTY BOARD, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to The Supreme Court of Virginia

BRIEF IN OPPOSITION FOR RESPONDENTS

1421 S. Ferne Street, Inc., 1411 S. Ferne Street, Inc., 1401 S. Ferne Street, Inc., 1311 S. Ferne Street, Inc., 1301 S. Ferne Street, Inc., 1221 S. Ferne Street, Inc., 1211 S. Ferne Street, Inc., 1201 S. Ferne Street, Inc., ARNA-FERN, Inc., 1400 Eads Street, Inc., 1200 Eads Street, Inc., 1101 Ferne Street, Inc., ARNA-EADS, Inc., Pentagon Tract Dev. Corp., and River House Corporation

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BRIEF IN OPPOSITION FOR RESPONDENTS

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JURISDICTION

Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1257(3). However, this Court has repeatedly held that it will not properly review an issue under that provision unless the issue presented for review

was properly presented to, and passed upon by, the State court below. *E.g., Hill* v. *California,* 401 U.S. 797, 805 (1971); *Atlantic Coast Line RR Co.* v. *Mims,* 242 U.S. 532, 535 (1917). The purpose of this rule is to assure that state courts are first afforded the opportunity to consider and decide the federal question. *Hill* v. *California, supra,* 401 U.S. at 805.

The question of "procedural due process" now presented to this Court was simply never presented to the Supreme Court of Virginia in a manner which would have qualified it for consideration by that Court—or even in a manner which gave that Court a decent opportunity to take notice of the precise issue petitioners had in mind.

The petitioners indisputably failed to include the Constitutional issue raised here among the five specific assignments of error listed in their Petition for Appeal to the Supreme Court of Virginia. That failure alone is dispositive of the question of whether the issue raised here was first properly presented below, for Rule 5:21 of the Rules of the Supreme Court of Virginia [1] provides:

> Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below.

[1] The purpose of the Virginia rule is to point out errors with reasonable certainty in order to direct the Supreme Court and opposing counsel to the points on which the appellant intends to ask a reversal of the judgment, and to limit discussion to these points. *Harlow* v. *Commonwealth,* 195 Va. 269, 77 S.E.2d 851 (1953); *Omohundro* v. *County of Arlington,* 194 Va. 773, 75 S.E. 2d 496 (1953).

Had petitioners merely included the "fundamentally important" Constitutional issue (Petits.' Brief at 15) they raise here among the specific assignments of error presented to the Virginia Supreme Court, that court might have been put on notice of the alleged importance of the issue and could have given it due consideration. Instead, the closest petitioners came to presenting that issue to the court below was in the following cryptic footnote, buried in the 37th page of a 50-page petition:

> "* As stated in the Petition for Declaratory Judgment, appellants maintain that the Board action of February 25, 1976 constituted a violation of the Board's duty under the Fourteenth Amendment the [sic] Constitution of the United States. Although precluded by this Petition's pagination limit from fully setting forth that argument, appellants nevertheless intend to rely upon it and specifically preserve it for consideration on appeal."

Not only does this vague footnote reference fall short of the specific assignment of error required by Virginia Supreme Court Rule 5:21, but it does not even approach the degree of specificity needed to satisfy the requirement that the issue be "properly presented" to the court below. *C.I.O.* v. *McAdory,* 325 U.S. 472, 477 (1944). The petitioners' footnote did not even apprise the Virginia Court of *which* clause of the Fourteenth Amendment they were invoking,[2] much less as to how that unspecified clause had allegedly been violated by

[2] Constitutional challenges to zoning-related actions are frequently based upon the Equal Protection Clause of the Fourteenth Amendment, as well as upon the Due Process Clause. *See, e.g., Village of Euclid* v. *Amber Realty Co.,* 272 U.S. 365, 384 (1926).

the Board's proceedings. Thus, since the question presented here "was not asserted at a time or in a manner calling for its consideration by the highest state court under its established system of practice and pleading", *Atlantic Coast Line RR Co.* v. *Mims, supra,* 242 U.S. at 535, this Court should not exercise jurisdiction to review it on writ of certiorari.

QUESTIONS PRESENTED

1. Where the rules of practice and pleading of the highest State court below provide that it may not admit as a ground for reversal of the decision below any ground not assigned as error in the petition for appeal to that court, and where the petitioners failed to assign as error to that court the sole question presented for review in their petition for Writ of Certiorari to this Court, should this Court grant a Writ of Certiorari to review that question? (Respondents' discussion of this question is set forth under the heading "Jurisdiction," *supra.*)

2. Where those opposing rezoning in a local legislative zoning board proceeding had a full and fair opportunity to present their views in opposition in hearings before the board and in a subsequent trial *de novo* of the issues in a state court, are such opponents deprived of procedural due process under the Fourteenth Amendment because the board and the court did not deny the rezoning in question on the basis of alleged traffic and pollution consequences, where the effect and magnitude of such consequences were disputed in the proceedings?

STATEMENT

Petitioners seek the Court to review the decision of the Supreme Court of Virginia denying an appeal of the Arlington County Circuit Court's (the "Circuit Court") judgment sustaining a decision of the Arlington County Board (the "Board") authorizing the rezoning of certain lands owned by these Respondent-Intervenors (hereinafter referred to as the "Landowners").[3]

As shown by the particular examples listed below, petitioners' Statement of the Case presents a grossly distorted picture of the lengthy, thorough and conscientious procedures followed by the Board and the Circuit Court. The reality is that the Board, presented with a carefully-structured proposal for locating needed high-density development in an area which was already zoned for high-density use (XX pp. 83-86), and which would optimize use of newly built mass transit facilities already situated on the site, exercised its legislative judgment by granting the developers a high-density zoning approval which was substantially *less* than they had actually proposed (Petit., App. A, 8a).[4]

Contrary to petitioners' assertions, the Board did not make its decision without investigation, or in the

---

[3] The landowners were defendant-intervenors in the proceedings below in both the Arlington County Circuit Court and the Supreme Court of Virginia.

[4] The abbreviations "PX" and "DX" refer to exhibits offered by the petitioners and the respondents, respectively, at the trial. References to Roman numerals are to the indicated volume of the trial transcript. The memorandum opinion of the trial court will be cited by reference to the appropriate page of the copy of that opinion set forth in Appendix A to the petition for certiorari.

face of collective opposition from the various specialized County agencies having an interest in the matter. A detailed 65-page transportation analysis, setting forth in graphic detail projected traffic congestion consequences, was submitted to the Board and debated in numerous hearing sessions before the Board (PX 10). The County Planning Staff, the Planning Commission and the County Manager all recommended in favor of the rezoning (DX 30, pp. 1, 6; PX 5, p. 1). Thus, the stated opposition of the County Transportation Commission, a citizens' advisory board of no particular expertise (VI, pp. 20-21), was but one of numerous viewpoints which the Board heard and considered in reaching its decision.

Petitioners had every opportunity to express their opposition to the rezoning action in multiple public hearings before the Board and in the 12-day *de novo* review of the decision in the Circuit Court. Petitioners were entitled to challenge the wisdom of the proposed rezoning, but they were not entitled, as they are now asserting, to have the Board and the successive reviewing courts accept as dispositive their particular views as to the gravity of traffic congestion or pollution consequences. Rather, as stated by the trial judge (Petit., App. A, p. 3a):

> The issue is not whether the Court favors or does not favor the building of the proposed "Pentagon City". The issue is whether the County Board in enacting the zoning legislation acted in a manner which was clearly unreasonable, arbitrary or capricious and without reasonable or substantial relation to the public health, safety, morals or general welfare. A further legal principle involved is that: "The Court will not substitute its judgment for that of a legislative body, and if the reasonable-

> ness of a zoning ordinance is fairly debatable, it must be sustained." *Fairfax County* v. *Allman*, 215 Va. 434 (1975).
>
> The Court finds that the reasonableness of the zoning and site plan action was clearly debatable. Accordingly it is sustained and the prayers of the Petitioners are denied.

Beyond its inaccurate portrayal of the nature of the proceedings below, the petitioners' Statement of the Case also contains numerous particular statements which are either directly contradicted or unsupported by the actual record below. Among the more fundamental examples of such errors are the following:

1. In paragraph (3), petitioners quote from a report which they then state represents the recognition by the Arlington County Board that the Pentagon City Tract involved in the zoning decision in issue "will have a direct adverse impact upon the property values of these petitioners." In fact, the report in question was a 1973 report, concerning an area-wide neighborhood conservation plan not related to the 1976 rezoning proposal for Pentagon City, which was offered for the limited purpose of establishing standing (I., pp. 67-69). As such, that report can hardly be cited as representing the Board's perceptions of the effects of the specific rezoning proposal for Pentagon City which was before it in this case. Further, the trial court specifically found that "The plaintiffs have *not* proved in terms of dollars that their specific property interests will be harmfully effected by the increased traffic." (Petit., App. A, p. 3a).

2. In paragraph (4), petitioners describe the proposed zoning as allowing ". . . the construction of a

huge physical plant, including a series of 22-story buildings with a vast physical capacity." The "series" of 22-story buildings consist, in fact, of only 4 such buildings. The "vast physical capacity" described by Petitioners was in fact a relatively minor increase in density (Petit., App. A, p. 8a), and was less intense than development could have been under the pre-existing zoning with site plan approval (DX4, DX10, DX20, DX27; XX at 83-86). High-density zoning had existed on the subject site for an extended period of time, and was in keeping with Arlington County's adopted general land-use plan (Petit., App. A, p. 8a).

3. In paragraph (5), petitioners assert that there was no dispute concerning the jammed traffic conditions at peak-hours projected for three intersections in the rezoned tract by 1990 in a transportation analysis report submitted to the Board. In fact, the author of the report testified at the trial that those projected conditions would probably not occur in fact, noting that they were based upon certain theoretical assumptions (e.g., that no traffic would resort to longer alternate routes, even if the shortest routes were congested) which he was constrained to accept for purposes of the study (XI, pp. 63-71, 102-103; Petit., App. A, p. 7a). The County Highway engineer also testified as to his opinion that the F-level jammed conditions would not eventuate in reality (XV, pp. 18, 37-52; Petit., App. A, p. 7a).

4. Petitioners repeatedly characterize the "F-level" peak-hour traffic conditions projected for three intersections in the tract by 1990 in the initial planning report as "unacceptable" aspects of any development proposal. Yet petitioners' own witness acknowledged

that, by 1992, *50%* of all peak-hours vehicle trips in the whole Washington metropolitan area would be made at service levels similar to those levels projected for the worst intersections of the proposed development at peak-hours in 1990. (XXIII at 5, 16, 43-48).

5. In paragraph (13), petitioners assert that there was no testimony or evidence identifying any method for alleviating jammed peak-hour traffic conditions which might occur in the proposed development. The record shows, however, that the County and the property owners pointedly demonstrated a variety of specific means to alleviate such conditions. (e.g., Petit., App. A, p. 7a; XVII at 9-10; 26-27).

6. In paragraph (14), petitioners set forth, *inter alia,* the proposition that the Pentagon City development "will seriously exacerbate the [air pollution] situation in terms of human health" and then further assert that this proposition "was literally undisputed at trial." In support of this specific and wholly unqualified statement, petitioners cite nothing more than the hypothetical opinion testimony of *their* witness that jammed traffic conditions he was asked to *assume* for purposes of the question would "contribute to"—not "seriously exacerbate"—photochemical oxidant pollution (VII at 108-09).

7. Finally, petitioners' paragraph (15) sets forth their own subjective assessment that the trial court "misunderstood" the legislative record because he cited in his opinion the sharp conflict in expert testimony which highlighted the trial *de novo,* whereas petitioners stress that there was no "clash of experts" before the Board. If the petitioners' observation in that regard proves anything, it is only that the peti-

tioners reserved their expert opposition testimony for the court proceeding. It in no way supports petitioners' suggestion that the expert evidence before the Board on traffic congestion was uniformly dismal, since the expert traffic forecast which *was* presented to the Board concluded that the level of traffic service would be acceptable and that congestion potential could be minimized (PX 10, p. 65). More to the point, all that the reviewing court had to "understand" on review was that the Board's decision was based on proper legislative considerations and was neither arbitrary nor capricious.

ARGUMENT

Even if this Court could properly take cognizance of an issue which was not articulated or assigned as grounds for reversal to the court below, the question presented does not begin to satisfy the applicable criteria of Rule 19(a) of the Rules of the Court. The Court has many times laid down the criteria for judicial review of local legislative zoning actions under the Fourteenth Amendment, and the rulings of the Virginia courts below were in complete accord with them. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328 (1927). The only possible distinction between those cases and the question presented here is rhetorical rather than substantial; petitioners have merely characterized what is nothing more than their disagreement with the results reached below in the guise of a "procedural" due process argument.

However, the petition for certiorari is devoid of any claim that petitioners were denied a full and fair hearing of their views by the County Board or the Trial

Court.[5] Instead, the petition is replete with allegations that the Board did not "understand the consequences of its action" and that the trial judge "misunderstood what had transpired before the Board" (Petit. pp. 7, 9-10). This Court could not undertake to probe the mental processes of a legislative body such as the Arlington County Board to ascertain whether it "understood" what it was doing, *see United States* v. *Morgan*, 313 U.S. 409, 422 (1941), any more than the Virginia courts below could undertake to do so, *see Blankenship* v. *City of Richmond*, 188 Va. 97, 49 S.E. 2d 321 (1948). Rather, the zoning proceedings below satisfy due process requirements so long as (1) the results reached were "fairly debatable" or, put another way, not arbitrary or capricious, *Euclid* v. *Ambler Realty Co., supra;* and (2) the proceedings "secure to adverse parties an opportunity to be heard, suitable to the occasion", *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 246-47 (1944).

Little need be said to show that the results of the zoning proceedings below were in accord with this Court's "fairly debatable" standard of substantive review. It takes only a brief reading of the Circuit Court's opinion appended to the petition for certiorari to see that this case falls squarely within the rule stated by the Court in the *Zahn* case, *supra*, 274 U.S. at 328:[6]

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[5] They could hardly do so in light of the fact that they were allowed to argue and produce evidence in support of their position at multiple public hearings before the County Board and its advisory commissions and in twelve days and two evenings of testimony before the Circuit Court in a trial *de novo*.

[6] This case, unlike *Moore* v. *East Cleveland*, U.S. , 52 L.Ed.2d 531 (1977), is *not* one where the "... usual judicial def-

> The most that can be said is that whether that determination was an unreasonable arbitrary or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that *it will not substitute its judgment for that of the legislative body charged with the primary responsibility of determining the question.* [emphasis added].

The whole thrust of petitioners' argument that the Board's decision was "unreasonable beyond debate" lies in their partisan philosophical disagreement with the means chosen by the Board to cope with the complex problem of structuring and locating inevitable high-density devlopments in a manner which is in harmony with rational development of an expanding metropolitan complex.

Thus, petitioners harp upon the allegation—contradicted by the record—that the Board and the trial court arbitrarily disregarded the impact of certain levels of traffic congestion [7] said to be the direct and inevitable consequence of its rezoning decision.

Initially, the record refutes petitioners' suggestion that the evidence before the Board and the court inexorably pointed to an insoluble traffic situation. Thus,

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erence to the legislature is inappropriate" because of any "intrusive regulation of the family" or other areas of personal liberty. All that is even arguably involved here is a speculative effect on property values which petitioner failed to prove below (Petit. App. A, at 3a).

[7] Needless to say, the traffic congestion produced by a zoning action is but one of the multiple inter-reacting considerations that must be taken into account in making a legislative zoning decision. Petitioners argument implies, and is really dependent upon, the erroneous premise that this one issue eclipses all other factors the Board had to consider.

while the initial report prepared for the County by traffic expert Pratt (the "Pratt Report") forecasted the possibility of "F-level" conditions at three intersections by 1990 based on a given hypothetical assumption that traffic in the area would be restrained from taking alternate routes, Mr. Pratt testified at trial that he did not believe such levels would in fact occur on the tract (XI at 102-103).[8] There was further separate testimony that such levels of congestion may not occur over a sustained period where alternate routes are available (XV at 18, 37-52). Meanwhile, petitioners' expert witnesses prepared no report of their own. but confined themselves to second-guessing the Pratt Report. Thus, the trial judge accurately stated the case when he observed [Petit., App. A at 8a]:

> When qualified experts are in genuine disagreement in their forecasts of conditions in 1990, then for the County Board to accept one view or the other is neither arbitrary nor capricious.

Here, the County Board elected to approve the Pentagon City Tract rezoning in order to, *inter alia,* locate high-density development on the site of an existing Metro subway station, which is in turn surrounded by a complex of interstate highways and arterials, so as to encourage mass transit usage and divert traffic flow from adjoining residential areas (Petit., App. A, pp.

---

[8] Mr. Pratt's trial testimony was wholly consistent with the conclusion of the report presented to the Board, which said (PX 10 at 65):

> The Pentagon City street grid as recommended provides an acceptable level of traffic service at all internal locations, with congestion potential . . . being restricted to three perimeter intersections. Recommendations and suggestions have been provided for minimizing those localized negative impacts that must be accepted in order to gain the overall environmental benefit of the development.

2a; PX 10, p. 65). Since the trial court found that these and other beneficial objectives would be served by the rezoning decision (Petit., App. A, at 9a-10a), what this Court said 41 years ago in the *Euclid* case is directly in point here and lays to rest petitioners' contention that the Board's decision bears no "rational relationship to permissible state objectives" (Petit. p. 13):

> [T]he reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. [272 U.S. at 395]

Petitioners do not dispute that they were afforded every opportunity to press their views in opposition to the Pentagon City Tract rezoning decision in multiple hearings before the County Board and in a 12-day trial *de novo* in the Circuit Court. Indeed, the citations of adverse comment set forth in petitioners' own brief (Pet., p. 6, ¶ (6)) unwittingly attest to the fact that the fair and open procedures below "secure[d] to adverse parties an opportunity to be heard." Thus, petitioners' contention that they were denied "procedural" due process in the rezoning proceedings gets no further than decades-old decisions of this Court confirming that state procedures directly analogous to those followed in this case are fully in keeping with Fourteenth Amendment procedural requirements. *Anderson Nat'l Bank* v. *Luckett, supra; RR. Comm'n of California* v. *Pac. G&E Co.*, 302 U.S. 388, 395-98 (1938); *Pac. Livestock Co.* v. *Lewis*, 241 U.S. 446 (1916).

Absent from the petition for certiorari is citation to any case of this Court[9] or any other federal court[10] standing for the extraordinary proposition underlying their argument: That due process requires legislative bodies to withhold zoning decisions until they have independently investigated and reinvestigated, to the satisfaction of all persons concerned, every ramification of their decisions which offends someone's notions of what is "acceptable". Petitioners would have it that since the County Board did not ascribe probative force to petitioners' apocalyptic views on traffic congestion, and thereupon suspend all action to "investigate" what the apocalypse would be like, they were deprived of due process. But this Court long ago laid to rest the notion that an administrative body—still less a legislative body—need assign any degree of probative force to a particular set of views as a matter of procedural right. As stated by the *Court in Railroad Comm'n of California* v. *Pac. G&E Co., supra,* 302 U.S. at 395-98:

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[9] *Euclid* and *Moore*, both cited by petitioners in support of their "procedural" arguments, plainly have nothing to do with the adequacy of procedures. *Euclid* squarely supports affirmance in this case, *see* pp. 11, 14, *supra*, and *Moore*, having to do with intrusions on personal choice in family living arrangements, concerns wholly distinct issues.

[10] *Citizens Association of Georgetown, Inc.* v. *Zoning Comm'n of D.C.*, 155 U.S. App. D.C. 233, 477 F.2d 402 (D.C. Cir. 1973), also relied on heavily by petitioners, was a decision interpreting the D.C. Administrative Procedure Act with respect to the requirement for a statement of reasons in support of zoning decisions. Federal Constitutional law was simply not involved and the portion of the opinion quoted by petitioners (Petit. at 13-14) was acknowledged by the Court to be *dicta* on an issue which was "not before the court", 477 F.2d at 410.

> Whether in this instance the Commission was in error in treating respondents estimates as without probative force, we have no means of knowing as the evidence is not before us, *but its error in that conclusion, if error there be, was not a denial of due process.* [emphasis add].

All that remains, therefore, is whether the Virginia procedure of Board hearings followed by *de novo* review in the Circuit Court afforded petitioners a full and fair hearing compatible with due process. On this score, all the petition seems to suggest is the remarkable notion that because the reviewing court entertained and considered the testimony of petitioners' experts in *opposition* to the rezoning, which testimony had not been offered to the Board, the *Board* proceedings should therefore be viewed as somehow retroactively deficient (Petit., pp. 9-10, ¶ (15)). The simple answer to this is that the Board heard and considered all the opposition testimony and evidence that petitioners saw fit to present it. Further, petitioners' argument proceeds on the erroneous legal premise that the thorough judicial review of the Board's action which they obtained in the County Circuit Court is not to be taken into account in determining whether they were afforded "procedural" due process. On the contrary, such judicial review afforded petitioners their full measure of due process. *Anderson Nat'l Bank* v. *Luckett, supra,* 321 U.S. at 246-47; *Pac. Livestock Co.* v. *Lewis, supra,* 241 U.S. at 451. As the Court flatly stated in the *Lewis* case:

> That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the Court is not debatable. [*Id.* at 451]

Therefore, since the petition for certiorari does not even allege that the trial court proceeding was "procedurally" defective"—alleging only that the judge "misunderstood" the issues—there is simply no remaining basis to the petitioners' "procedural" due process contentions.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-781

PENTAGON CITY COORDINATING COMMITTEE, INC., *et al.*,
Petitioners,

v.

ARLINGTON COUNTY BOARD, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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OPPOSITION TO JURISDICTION

The Court is without jurisdiction to consider this petition under 28 U.S.C. §1257(3) because the question of procedural due process under the Fourteenth Amendment to the Constitution of the United States was not raised in the Court below. The initial pleadings in the trial court did refer

to the Fourteenth Amendment, but neither the Fourteenth Amendment nor the phrases "due process" or "procedural due process" (now advanced as a basis for relief) were referred to by the petitioners during the trial or in their arguments prior to the judgment of the trial court. The contention of the petitioners at trial was merely that the Virginia legislation enabling local governments to enact zoning ordinances requires a local governing body to evaluate the effect of any traffic congestion which may result from a zoning action as well as any resulting environmental pollution. Significantly, in the Virginia Supreme Court no violation of the Federal Constitution of any kind, including a violation of the Fourteenth Amendment, was "assigned as error". Rule 5:21 of the Rules of the Supreme Court of Virginia provides in part, as follows:

> "Only errors assigned in the Petition for Appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below."

It is true that in footnote 37 on page 37 of the Petition for Appeal to the Virginia Supreme Court the petitioners stated that the "Board Action of February 25, 1976 constituted a violation of the Board's duty under the Fourteenth Amendment [of] the Constitution of the United States." Footnote 37 went on to say:

> "Although precluded by this Petition's pagination limit from fully setting forth that argument, appellants nevertheless preserve it for consideration on appeal."

This was not a footnote to an assignment of error or statement of question presented, but merely a footnote in the body of the petitioner's Virginia argument. Arlington County contends that this passing reference was not a proper assignment of error.

Assuming that there was a proper assignment of error under Virginia law, the record still does not show that there was a fair reliance by the petitioners on the Federal Constitution nor were the lower courts or the adversaries of the petitioner given any basis for discussing and considering a Fourteenth Amendment argument. At no point prior to the filing of the petition for a writ of certiorari did the petitioners make any showing or statement from which any observer could tell whether they were relying on the Equal Protection or Due Process clause of the Fourteenth Amendment or whether their argument, if it was a due process argument, was asserting a substantive or a procedural due process claim. Thus the necessary jurisdictional basis for review is absent. *Hill* v. *California,* 401 U.S. 797, 805 (1971). This Court should find that it has no jurisdiction to consider the Petition for a Writ of Certiorari.

OPPOSITION TO PETITIONERS' STATEMENT OF QUESTION PRESENTED

Arlington County is compelled to take the somewhat unusual step of disputing the question alleged to be presented, because the factual basis for the question posed by the petition is not present. Although the petitioners phrase the question as if they had done so, at no stage of the trial did they make any issue of the effect of the action challenged on their property values. There was no evidence of any kind of any effect on the fair market value of their property. The trial court found (p. 3a of App. A to the petition) that there was no such effect.

The petitioners also did not prove that the County Board did not "ascertain the dimensions of the public welfare problems involved...." Neither did they prove "that the proposed development will cause an apparently insoluble public welfare problems [*sic*] of unmeasured dimensions in terms of traffic, [and] pollution...." (See App. A of the

petition, pp. 5a, 7a, 8a, and 9a paragraph 2.) Since the factual basis for the question alleged to be presented by the petitioners is not present in this case, the petitioners are mistaken when they argue that such a question is presented for review by this Court.

Moreover, even if the existence of the facts which the petitioners assert as a basis for review is assumed, it is not clear that these facts present a *procedural* due process question for review. In order to consider a procedural due process question, it is necessary to know whether or not the decision for which review is sought is legislative, administrative, or judicial. By using the phrase "a state zoning body" and the word "authorize", the petition avoids the question of what kind of decision is being considered. When it is understood that the decision being challenged is legislative (as Arlington County's agrument which follows will assert), it can be seen that the question really being stated by the petitioners is as follows:

> Where a state legislative body after statutory notice and hearing is considering zoning legislation applying to a particular parcel of property which would change the use permitted and increase slightly the right of the property's owner to use the property, and the opponents of the legislative act allege that the act will have harmful results, may the state legislative body enact the legislation, assuming they have been shown to have done so without ascertaining the dimensions of the harmful effects alleged?

Stated differently, the question would be:

> Does the enactment of zoning legislation after statutory notice and hearing, changing the

> regulations with respect to a particular land owner's property and promoting its development, deprive persons who would suffer from the allegedly harmful consequences of the legislation of the procedural due process guaranteed by the Fourteenth Amendment?

RESPONDENTS' STATEMENT OF THE CASE

Arlington County has previously reminded the petitioners that it disputes the facts they have alleged to exist. The many factual errors in the petitioners' statement of the case will not be catalogued. This statement will try to give a brief picture of the events up to this time, and after that, certain of the disputes will be pointed out.

The 116 acres in question are generally south and across Interstate 95 from the Pentagon. Before the land use actions under consideration, only about 16 acres were developed, and those by warehouses along the eastern side. A Western Electric Plant near the middle of the area is not part of the 116 acres. (Since the decision of the trial court, development has begun on the southeast portion.) Development of the tract has been expected for many years. At least since the time it was known that a metrorail station would be located in the center of the tract, much time has been spent by those concerned with land use planning in Arlington reviewing the question of the best uses for this tract. In 1974, the land was designated as a "Coordinated Development District" on the General Land Use Plan (Ex. PX1) of the County. In 1973, a new zoning classification was added to the county code designed particularly for metro transit corridors (known as C-O 2.5). About 24 of the 116 acres were in a zoning classification allowing more use than this new classification and the remainder was in either medium density apartment categories or under industrial classification.

For several years, the County planning staff, a planning firm hired by the landowners, and residents of the area of Arlington south of Interstate 95 worked together to develop plans for these 116 acres. In 1975, a plan was presented to the County Board under which the land would be rezoned to the new C-O 2.5 zoning category, and site-plan approvals would be given for the precise intensities of offices, apartment buildings, hotels, retail shopping and other uses such as apartments for retired people and a nursing home. The plan originally presented in 1975 for legislative action would have allowed slightly more uses than were likely to have occurred under the old zoning classifications, with reasonable approvals. However, after the granting of the zoning and the giving of the approvals, the plan approved by the legislative action of the County Board was about the same as those likely to have occurred under the old zoning with reasonable approvals. (Transcript XX, pp. 77-88.) The difference was that the various uses approved could be placed throughout the entire area of the site and concentrated in different areas than they could have been under the old zoning, so that an area once zoned for apartments might end up with offices and vice versa.

The actual plan approved is as follows:

Office Area	Hotel Units	Commercial Area	Apartment Units
1,250,000 sq. ft.	2,000	800,000 sq. ft.	6,200

The total number of square feet in the buildings approved is just slightly more than twice the number of square feet in the land. (Transcript XX, p. 114.) This is what is known as a 2.0 Floor Area Ratio (F.A.R.). The zoning category in question allows up to a 2.5 F.A.R. The characteristic zoning category in the Rosslyn and Crystal City districts of Arlington allows up to a 3.5 F.A.R. The characteristic zoning category (C-4)

in which office buildings and hotels are being built in the K Street, N.W. area of the District of Columbia has an F.A.R. of 8.5 to 10.0. (§5301.1 and §5301.2 Zoning Regulations of the District of Columbia — 1973 Reprint). The plan observes current canons of land use and transportation planning. Its balance of offices, hotel units, commercial space and apartment units is consistent with approved notions of how urban development should take place. In order to encourage healthy patterns of use in cities and to reduce the dependence on the car, which is widely believed to cause dangerous air pollution and over-consumption of scarce fuel, such mixtures and location of uses are encouraged. It is also believed that a more humane pattern of living occurs when offices, commercial activities and residential units are mixed in the areas near the center of cities where persons who like an urban style of life choose to live. Pentagon City is near the established, densely developed areas of the Washington, D.C. region. Therefore the concentration of new metropolitan growth at Pentagon City is calculated to avoid the increase of vehicle miles travelled throughout the region likely to result from the concentration of developent at locations like those near the Capital Beltway. Its location near an operating metro station is considered ideal. After the hearings on the zoning application got under way, opposition to the proposed changes developed, mainly from persons residing in the mostly single family district south of the tract and the existing apartment houses to the west (where all of the petitioners live). These persons argued that the increase in traffic caused by the development and the pollution from that extra traffic would be horrendous. The land use planners and transportation planners responded that these problems were exaggerated and that they were area-wide problems. From the point of view of those trying to fight the regional problems of traffic and air pollution, as well as other problems, the location of the proposed development here, rather than elsewhere, was indicated. The foregoing could be expanded but it is the

perspective from which Arlington County believes this Court should review the case.

The report referred to by paragraph (3) of the petitioners' statement of the case in no sense presents the position of the County Board. It was a 1973 report entitled Arlington Ridge Neighborhood Conservation Plan (Ex. PX4) and the quotation in the petition represents an instance of the County's continuing concern to protect its residential neighborhoods from excessive traffic and parking. While such traffic and parking sometimes reduces property values, it is improper to conclude in this case that the traffic and parking has adversely affected the value of any property of the petitioners. The petitioners have proved no effect on their property values. See petitioners' App. A at page 3a, where the trial court found: "the plaintiffs have not proved in terms of dollars that their specific property interests will be harmfully affected by the increased traffic."

Paragraph (4), which refers to "a huge physical plant" with "a vast physical capacity", gives a misleading impression. As stated above, the development approved provides for barely more than twice as many square feet of floor space in the buildings approved as there are square feet of land in the tract. This is as if the property owners had been granted the right to build a two-story building over the entire tract.

Paragraph (5) stating that the traffic study showed "without dispute" that traffic jams would occur, is also in error. The study in question did not show that at any intersections there would be any jammed traffic conditions at any time. What it showed was that if vehicular traffic was entirely banned in the residential neighborhoods nearby, if all the other multi-unit residential and commercial development besides Pentagon City occurred, and if Pentagon City were built to a higher density than actually was approved,

then there would be either E or F levels[1] of traffic service at key intersections in the morning and evening rush hours in 1990.

Paragraph (6) is not true. The Arlington County Transportation Commission is not a sister agency of the Arlington County Board. It was not created in recognition of the inexpertise or expertise of anyone. It is an advisory board like the Commission on Aging, Parks and Recreation Commission, Historical Commission and numerous other such boards which have been created by resolution and not by ordinance of the Arlington County Board. So far as the County knows, there is only one expert in Transportation on that board and that is Ronald Sarros who has been head of Transportation Planning for the Washington Metropolitan Council of Governments. Unlike a majority of the Commission, Mr. Sarros voted in favor of the plan originally proposed which was more intense than the one under attack here.

Paragraph (7) is also false. The experts in Traffic Engineering and Transportation Planning employed by the County reviewed the development and had no fears for the traffic consequences; they found the development a means of promoting their goals which are the goals of professionals concerned with traffic and pollution problems. Although the Board may have been warned about possible traffic

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[1] An E level of traffic occurs during any hour when an intersection has between 80% and 100% of its capacity throughout the hour. An F level occurs when more than 100% of capacity occurs during an hour long period. A problem with the use of E and F designations is that they sometimes gain naive acceptance by those who believe that traffic capacities can be measured more precisely than reality shows. It is difficult, first of all, to measure the capacity of an intersection and, secondly, to predict the amount of traffic that will flow through that intersection on some future date. (Transcript XV, pp. 24-25.)

congestion in 1990, no experts in the field ever warned the Board, except the study referred to above in the discussion of paragraph (5). That study used artificial assumptions for a development denser that the one approved and was discounted by the experts.

The County has never agreed that a vested right was conferred upon the developers on February 25, 1976, because no one responsible for making such decisions on behalf of the County has ever evaluated that question. The County also disputes paragraphs (11), (12), (13) and (15) of the petitioners' statement. The conclusions stated in paragraphs (11) and (12) are based on questionable standards[2], and on additional false assumptions made by the statistician-petitioner who calculated the mile-long queues and the speeds of one mile per hour. Similarly, no "breakdowns" in the traffic system were proved. The misunderstanding referred to in pararaph (15) is not a misunderstanding of the trial judge but of the petitioners. What the trial judge found is that the petitioners did not prove that reasonable men, or even reasonable experts, would agree that the petitioners' predictions were correct. (See App. A to petition, last paragraph, p. 7a concluding on p. 8a.) The County does dispute that the petitioners have proved that there was no disagreement (in the sense intended by the petitioners) among experts or others during the Board hearings on the matter. The petitioners have simply not proved this negative point. It is, however, their burden and if they had offered any evidence of their contention, then the County would have been in a position to rebut that evidence.

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[2] See footnote 1 on p. 9 of this brief in opposition.

REASONS FOR DENYING THE WRIT

As a threshold factual matter, it is clear that the challenged decision of the Arlington County Board will *not* have a direct adverse impact upon the property interests of the present petitioners and that the petitioners are *not* therefore in a position to present the constitutional claims here asserted.

If the petitioners were in a position to present the claims now asserted, then the primary reason that their petition should be denied is because the factual basis for their claim did not exist. They never proved it was reasonable to predict the horrendous traffic jams they rely upon or the increase in air pollution which would result from such traffic jams. In fact, the trial court found that this development will result in less air pollution and traffic congestion because of its balance of uses and its location near a metrorail station. (Petitioners' App. A, pages 5a, 8a and 9a.) The petitioners never proved that the Board did not make a reasonable investigation of the total traffic and air pollution problems, nor did they prove that the Board did not thereafter rationally strike the balance in favor of the development.

No procedural due process question is presented even if it is assumed for the purposes of the argument (1) that this Court has jurisdiction to consider this petition, (2) that the petitioners have rights which are affected by the action in question, and (3) that the factual basis for presenting the question is present. Any due process question which might be presented can be answered by an analysis of existing precedents and no useful purpose would be served by reviewing and affirming the decisions of the courts below in order to restate the principles in question.

It is unfortunate that the petitioners have not cited this Court to any procedural due process cases which stand for the proposition that the petitioners advance as a requirement for procedural due process by state legislative bodies

concerning zoning legislation. The cases of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977), involve substantive and not procedural due process. This Court has recently made clear that it considers a zoning action by a local governing body an exercise by that body of legislative power originally given it by the people. This is the reasoning of *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). The majority opinion in this case, written by Mr. Chief Justice Burger, discussed the cases of *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Company* v. *Roberge*, 278 U.S. 116 (1928). Those cases dealt with delegations by local city councils to a limited number of abutting property owners. The majority opinion speaks of the

> "thread common to both decisions [which] is the delegation of legislative power, originally given by the people to a legislative body and in turn delegated by the legislature to a narrow segment of the community..." *City of Eastlake* v. *Forest City Enterprises, supra*, at 677.

This supports the view of the law being advanced by Arlington County here. The zoning action of the Arlington County Board (like the Richmond and Seattle City Councils) is a legislative action and entitled to the review which is given to legislative actions.[3] The remedy for a property

[3] In Virginia, it is settled that the enactment and amendment of zoning ordinances is a legislative act. *Byrum* v. *Orange County*, 217 Va. 37, 39, 225 S.E.2d 369,371(1976) (making clear that the principle applies even to granting special use exceptions); and *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 443, 211 S.E.2d 48, 56 (1975), *cert. denied*, 423 U.S. 940 (1976) (applying the principle to local action rezoning particular parcels of property as well as comprehensive rezonings).

owner challenging a zoning restriction alleged to be erroneous is to challenge that restriction in state court on Fourteenth Amendment grounds. The review which is conducted in such cases goes to the question of whether or not the restriction being challenged is

> "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Ibid* at 676. (Citing *Euclid* v. *Ambler Realty Co., supra.)*

This judicial review of legislative actions provides opponents of zoning legislation with procedural due process, and a stranger to rezoned property or even a neighbor of it would have no greater right to challenge a rezoning than the property owner has. Arlington County would also urge the same distinction as that referred to in *City of Eastlake* v. *Forest City Enterprises, Inc., supra*, at 673-74. This is the distinction between administrative and legislative acts according to which there is a separation between

> "the power to zone or rezone by passage or amendment of a zoning ordinance, from the power to grant relief from unnecessary hardship." *Ibid.*

The granting of relief from unnecessary hardship is an administrative function which is usually delegated to boards of zoning appeals or boards of adjustments. An action of zoning or rezoning is legislative in nature.

The proper standard of review of such legislative actions when the issue of substantive due process is raised is the same as it is when the issue of equal protection is raised. This is the standard stated in *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961):

> "Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Mr. Justice White's dissent in *Moore* v. *City of East Cleveland, supra,* recognizes this point:

> "No case that I know of, including *Ferguson* v. *Skrupa* [372 U.S. 726 (1963)], has announced that there is some legislation with respect to which there no longer exists a means-end test as a matter of substantive due process law. This is not surprising, for otherwise a protected liberty could be infringed by a law having no purpose or utility whatsoever. Of course, the current approach is to deal more gingerly with a state statute and to insist that the challenger bears the burden of demonstrating its unconstitutionality: and there is a broad category of cases in which substantive review is indeed mild and very similar to the original thought of *Munn* v. *Illinois,* 94 U.S. 113 (1877), that 'if a state of facts could exist that would justify such legislation,' it passes its initial test." *Ibid* at 548.

This is the substantive due process to which the petitioners are entitled in cases of this nature. *Euclid* v. *Ambler, supra,* and *Moore* v. *City of East Cleveland, supra,* stand for no other proposition. It is true, of course, that infringement of a certain class of liberty interests or the classification of certain suspect categories will require greater scrutiny, and *Moore* v. *City of East Cleveland* happens to be one such case. However, the petitioners are not alleging any such protected liberty interest nor do they claim that they are members of a suspect classification being treated as such.

When the petitioners argue, as they do on page 13 of the petition, that *Euclid* v. *Ambler* and *Moore* v. *City of East Cleveland* stand for the following proposition and that it is a procedural due process question, they are mistaken:

> "Implicit in this reasoning process are the clear dual premises (1) that every state zoning body has an affirmative duty to weigh the various factors, pro and con, and reach its own decision as to where the public welfare lies, and (2) that it would be constitutionally improper for such a body either to refuse to consider the various factors or to promulgate a zoning decision without having done so if private property interests would be adversely affected thereby. [*sic.*]"

This is not only an erroneous analysis of the cases cited by the petitioners and a confusion of substantive due process and procedural due process, but it is also an effort to persuade this Court that it should inquire into the wisdom of actions by state legislatures.

The procedures to be followed in the case of amendments of the zoning ordinance were set forth in §15.1-431 (Va. Code Ann. 1975). The petitioners do not allege the violation of or failure to comply with any of these provisions. The District of Columbia case and the state cases cited by the petitioner are not appropriate. *Citizens Association of Georgetown, Inc.* v. *Zoning Commission of D.C.,* 477 F. 2d 402 (D.C. Cir., 1973), makes clear that the D.C. Zoning Commission "is not required to support its legislative-type judgments with findings of fact." *Id.* at 408. Arlington County agrees that different standards are applied to administrative decisions. The standards applied in the *Citizens Association* case are standards which, where proper, are applied by courts reviewing administrative

agency decisions. This is not the place to analyze the exact relationship between the statutory requirements for review of administrative agency decisions and the procedural due process requirements which the Fourteenth Amendment imposes on such decisions, because this is a case involving a legislative decision by a popularly elected state legislative body.

The case of *Brandon* v. *Board of Commissioners,* 124 N.J.L. 135, 11A.2d 304 (1940), cited by the petitioners, deals with the question of the review to be given a decision of a local Board of Adjustment, an administrative board. The cases of *Vece* v. *Zoning and Planning Commission,* 148 Conn. 500, 172 A.2d 619 (1961), and *Price* v. *Cohen,* 213 Md. 457, 132 A.2d 125 (1957), cited in the petition, involve interpretations by state courts of the requirements which the state enabling legislation imposes on local bodies enacting zoning legislation.[4] These cases formed the basis of the petitioners' argument in the Virginia Supreme Court, but were not cited in the trial court. The requirements imposed on local legislative bodies by state enabling legislation are questions of state law and not questions of federal procedural due process; they should not be considered by this Court.

The proper light in which to see this case is one in which the petitioners have been fully heard during the legislative process and in a judicial review on trial de novo lasting many days. The County Board's decision after all the hearings was based on professional reports from the planning staff and others. They make no complaint about any defect in the

[4] Arlington County interprets those cases as imposing certain positive requirements on local legislative bodies enacting piecemeal rezoning ordinances. Those requirements have not been adopted in Virginia. See *Fairfax County* v. *Snell,* 214 Va. 655, 202 S.E.2d 889 (1974).

procedures of the trial. They now continue to challenge the wisdom of the legislative action of the County Board by raising a spurious procedural due process issue. In fact, the balance has been struck in this case and the petitioners' introduction of this issue at this stage simply reflects their disappointment with the legislative decision and the judicial review of that decision. The standards to be applied to the review of such legislative decisions have been made clear by the Court and no purpose would be served by undertaking a review which would reach a predictable result. It would be especially inappropriate in this case because the petitioners have unreasonably withheld their assertions of violations of procedural due process until this late stage.

CONCLUSION

The petition should be denied.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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PRELIMINARY NOTE ON THE OPPOSING BRIEFS

Ordinarily a reply brief of this kind would immediately address the merits of the arguments presented in the opposing brief or briefs. In the instant case, however, because of the unusual nature of both of the two opposing briefs, we feel constrained to make a preliminary comment on the argumentative technique used in those briefs.

The would-be developers of the Pentagon City tract have apparently retained special counsel for the purposes of opposing our petition for certiorari. Those counsel did not participate in the trial and may not have had a chance to read the trial record. In any event, the developers' new counsel have opposed the

petition on the basic ground that it has "grossly distorted" the facts and is based upon "fundamental" factual "errors" (Dev. Br. 5, 7 [1]), with the alleged result that the constitutional issue for which petitioners seek review is not actually presented on this record.

It can be readily demonstrated that these serious charges of distortion are without substance. Instead of burdening the main body of this brief with a detailed demonstration of that fact, we have set such a demonstration forth in an appendix to this brief, but in order to illustrate the insubstantiality of the charges it may be appropriate here to refer briefly to two of "the particular examples" of the alleged "gross distortion" (Dev. Br. at 5):

(1) In order to give the Court some flavor of the magnitude of the proposed Pentagon City development, our petition referred to the proposed development's "huge physical plant, including a series of 22-story buildings with a vast physical capacity" (Pet. at 5). The developers' opposing brief asserts that this description constitutes "fundamental error" (Dev. Br. at 5, 7), their main point being (apparently) that there will be "only 4 such buildings" and that the number "4" does not constitute a "series". The comment is totally without substance. One of the five parcels of land making up the Pentagon City tract will contain not only four 22-story buildings but a number of 16-story buildings as well (XIX at 26), and other parcels will contain additional 16-story buildings (XVII at

[1] The opposing brief filed by the would-be developers (the brief with a red cover) will be cited herein as "Dev. Br." The opposing brief filed by the Arlington County Board (the brief with the white cover) will be cited as "Bd. Br." Our petition for certiorari will be cited as "Pet."

151-60). Moreover, the opposing brief of the Board states (we assume accurately) that the physical plant on the property will be equivalent to "a two-story building over the entire tract" (Bd. Br. at 8), meaning that the physical facilities will have more than 232 acres or 10,200,000 square feet of floor space, "vast" in any terms. If that be "fundamental error" or "gross distortion" which undercuts our petition for certiorari, so be it.

(2) In our petition (at p. 5, Para. 5) we asserted that the developers' own incomplete traffic report (the Pratt report), which constituted the only traffic analysis underlying the Board's decision, "showed, without dispute," that there would be "jammed traffic conditions" at at least three intersections on the tract—and we emphasized that if Mr. Pratt or the County staff had statistically computed the *consequences* of those three "jams" (as was later done at the trial, at considerable expense to petitioners [2]) the Board would have realized immediately that they were bound to cause a total breakdown in the traffic system and dangerous air pollution (Pet. at 5-6). The developers' brief now says that we have "grossly distorted" the facts because there was a "dispute" as to whether the three intersections would be jammed (Dev. Br. at 8).

The comment is both pointless and misleading. During the Board proceedings Mr. Pratt himself stated repeatedly that F-levels of service ("jammed conditions") would exist at the three intersections, and neither he nor anyone else suggested that they would not (XX at 49-50). Thus there was no dispute at all before the Board. It was not until the trial, more than

[2] See pp. 10-11, *infra*.

eight months later, that Mr. Pratt, realizing that his clients' interests were in jeopardy, expressed the newfound personal opinion that the technical calculations used by all professional traffic engineers (including himself) to predict traffic conditions may not be reliable (an after-thought which was overwhelmingly refuted by three of the most distinguished traffic engineers in the country) (VI at 41-46; XXII at 45; XXIII at 27-28). The fact remains that the Pratt report *did* say to the Board, without dispute, that there would be jammed traffic conditions on tract, and the Board flatly refused all requests of petitioners to evaluate their consequences for the traffic system as a whole.

As previously noted, the appendix to this brief will demonstrate that none of the developers' other charges of "gross distortion" and "fundamental error" is any more substantial than the two discussed above.

With respect to the opposing brief filed by the Arlington County Board, it will be observed that the brief consists in large part of factual assertions without record citation. In many if not all instances the assertions are in error, as demonstrated in the appendix, but in any event we would urge that the Court give no weight to any Board assertions for which no record support is supplied.[3] Where the Board's brief asserts that the petition for certiorari is factually in error, we have also dealt with those issues in the appendix.

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[3] One example of the Board brief's unsupportable assertions will illustrate the point. The brief flatly states (at p. 10) that the statistical analysis of the traffic back-ups or "queues", as presented at the trial, was based on "false assumptions". No record citation is provided, and the statement is incorrect. In fact the studies were verified by expert testimony (V at 21-22).

Putting these preliminary matters to one side, we can restate the three *essential* facts underlying the present petition for certiorari:

(A) The transportation analysis prepared by the developers and presented to the Board flatly predicted "jammed traffic conditions" at three intersections but did not in any way consider what effect those traffic jams would have on neighboring intersections and hence upon the traffic system as a whole (Pet. at 5-7). ***That fundamentally important fact is nowhere denied in the opposing briefs.***

(B) The statistical analysis of the consequences of those three traffic jams, as presented at the trial and verified for accuracy by Mr. Pratt himself (XIV at 3-13), firmly forecasts a total breakdown in the total traffic system if the Board-approved development goes forward (Pet. at 8-9). ***That fact is nowhere denied in the opposing briefs.***

(C) The Board was explicitly warned that the developers' traffic analysis was inadequate and that the only responsible course would be to assess the traffic situation as a whole before reaching a decision on the proposed development.[4] That essential fact is nowhere denied in the opposing briefs.[5]

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[4] Pet. at 6. See also PX 7, PX 37, and PX 53, each of which was offered in evidence at the trial and excluded on grounds of relevance.

[5] The Board's opposing brief states as follows: "Although the Board may have been warned about possible traffic congestion in 1990, *no experts in the field* ever warned the Board, except the [Pratt] study . . ." (Bd. Br. at 9-10). That study, in which the developers' own expert projected traffic jams, should have been warning enough, and the Arlington County Transportation Com-

As demonstrated below, these three essential facts present a pure issue of law which deserves to be heard and resolved by this Court.[6]

ARGUMENT

I. The Opposing Briefs Simply Do Not Address the Novel and Important Constitutional Issue Presented Here.

The opposing briefs take the position that our petition presents merely a conventional and unimportant *substantive* due process zoning issue "in the guise of" a procedural due process issue (Dev. Br. at 10). A somewhat over-simplified illustration may be useful in demonstrating that that is incorrect.

On the one hand, suppose that the proponent of a new zoning decision argued to the zoning board that the zoning would have advantage A for the community and that the opponents argued that advantage A was counterbalanced and outweighed by disadvantage B. Suppose further that the zoning body weighed A against B and granted the requested zoning. Obviously the many cases cited in the opposing briefs stand for the proposition that, so long as the Board's decision could have been reached by reasonable men (*i.e.*, so long as the issue was "fairly debatable" and the decision rational and noncapricious), the courts are not at liberty to substitute their judgment for that of the Board. That proposition, which is asserted again and again in the opposing briefs, is not contested by these petitioners here.

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mission and numerous citizens added loud warnings as well (Pet. at 6). Why more "expert" warnings should have been given is unclear.

[6] Our opponents' suggestion that the constitutional issue was not raised and decided below is discussed at pp. 12-14, *infra*.

But suppose that, after the proponent had presented its arguments with respect to advantage A, the opponents of the proposed zoning had come before the Board and said in effect, "There is demonstrably good ground to believe that the proposed zoning will have disadvantage B, but we do not have the resources to explore the problem fully, and we ask the Board to investigate the question whether the proposal will have that disadvantage before it reaches a decision"—and suppose that the Board had then refused to investigate and determine whether any such disadvantage would exist. It is the petitioners' position that, where the Board's decision adversely affects private property rights, such a decision would be procedurally improper and invalid, even though approval of the project would have been proper *if* the Board had investigated problem B and struck its own balance between A and B.[7]

We strongly disagree with the developers' suggestion that the distinction suggested above is "rhetorical rather than substantial" (Dev. Br. at 10). It is one thing to say that a zoning body can properly approve a project *after* evaluating its disadvantages, but it is quite another thing to say that a zoning body can properly approve a project without pausing to find out what its disadvantageous consequences will be. The differ-

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[7] We trust that the discussion in the text lays to rest the developers' suggestion that we are claiming that traffic congestion is the paramount factor that a zoning body must consider and that it "eclipses all other factors" (Dev. Br. at 12, n.7). Obviously such a body must consider all public welfare factors, of which traffic congestion and air pollution are only two. On the other hand, the Virginia zoning statute explicitly emphasizes the importance of considering "congestion in the public streets" and related problems of public health, safety, and general welfare. Virginia Code § 15.1-489.

ence, obviously, is that no one can tell whether the zoning body's actual decision would not have been different if it *had* understood the consequences of its action. Once such a body has made an *informed* and rational judgment, obviously a court cannot substitute its own, but if a zoning body has reasonably been requested and unreasonably refused to inform itself in order to reach such a judgment, the courts can and should require it to do so. In our submission, the procedural due process strictures of the Fourteenth Amendment do not permit a state zoning body to refuse to evaluate the consequences of a proposed development when a responsible showing has made that potentially it will have a serious but as yet unmeasured adverse impact on surrounding properties.

Apparently the developers contend that if a zoning body does not investigate an obvious potential problem before reaching a decision, and if the problem is later explored at a subsequent trial, the judicial proceeding can "be taken into account" (Dev. Br. at 16) and treated as curing the zoning body's failure to address the problem itself. But this contention in effect assumes that, when the reviewing court addresses the problem, its performs essentially the same function performed by the zoning body and that, even though the proper "legislative" weighing function was not fully performed by the zoning body, the process can be completed at the judicial level. Obviously this is incorrect. It would be wholly improper for the court to make any such "legislative" judgment (as properly observed by the trial court below, Pet. App. at 3a). Where a zoning body has failed to perform the weighing function in full (*e.g.*, by failing to investigate and measure the dimensions of an obvious public welfare

problem which will potentially arise from a proposed development), only the zoning body itself can properly complete the task, and judicial approval of such a zoning decision as being "fairly debatable" does nothing to cure the procedural defect in the zoning procedure.

It is true, as emphasized in the opposing briefs, that this precise procedural issue has never been decided by this Court (see Dev. Br. at 15; Bd. Br. at 11). The reason appears to be that in the past, whenever a zoning body has approved a development project without investigating potential problems of the kind involved here, the state courts have *uniformly* reversed and remanded under the mandates of their own state statutes, thus eliminating any occasion for review by his Court. (See the several state cases cited in the petition at page 14.) Indeed, it is precisely because this Court has never had an opportunity to deal with this novel constitutional issue that it was necessary to file the instant petition for certiorari.[8]

Putting the present arguments of our opponents in their best light, they seem to amount to a contention that the private citizens who brought this case had an

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[8] We disagree with our opponents' reading of Citizens Association of Georgetown, Inc. v. Zoning Commission of D.C. (cited in Pet. at 13; see Dev. Br. at 15, n.10). In the portion of the opinion on which we rely (which may be regarded as dictum) the court looked to the substantive constitutional standard (that a zoning decision must not be arbitrary or capricious, having no substantial relationship to the general welfare, 447 F.2d at 407) and also to a zoning body's "public interest mandate"—and from them (rather than "the D.C. Administrative Procedure Act," Dev. Br. at 15, n.10) the court found a duty on the part of the zoning body to investigate the consequences of a proposed project before approving it.

"opportunity to press their views" before the Arlington County Board (Dev. Br. at 14) and that that forecloses these petitioners from challenging the procedure followed by the Board. That contention, however, merely highlights one of the most important aspects of the case. In order to present their rezoning application to the Board in its most favorable light, these developers hired a consulting firm and paid it $500,000 to plan the development and persuade the Board to approve it.[9] The consulting firm, in turn, paid their hired traffic analyst (Mr. Pratt) $50,000 to prepare and present his dramatically incomplete traffic analysis (XII at 68-74). Other things being equal, an equally effective countering presentation by opposing private citizens (who, unlike the County, do not have staff engineers at their beck and call) might be expected to have cost equal sums.

Although resources of these dimensions are apparently available to developers of the sort involved here, it is obviously unrealistic to expect private homeowners like these petitioners to bring equivalent resources to bear in evaluating and, if necessary, challenging such a proposal. It follows that, if the potential disadvantages of a development of this kind are to be analyzed and presented to the zoning body, the task must be done at public expense—*i.e.*, by the local government involved. Otherwise adversely affected homeowners will plainly be deprived of due process. Here the petitioners

[9] The principal spokesman for the developers during the Board hearings was a Mr. Dewberry, who explicitly testified at the trial that his firm was paid $500,000 for their planning and presentation to the Board and that one of the firm's principal functions was "to try to persuade the Arlington County Board" to approve their client's proposals (XIX at 7-9).

explicitly beseeched the Board to order the County's professional staff to evaluate the "serious transportation problems" suggested by the Pratt report, pointing out that a few "volunteer citizens" lacked the resources to do so,[10] but no such evaluation by the County staff was ever made (XVII at 24).

We respectfully submit that it is time for this Court to consider whether such conduct on the part of a state zoning body does or does not violate the procedural due process rights of those private property owners who will be adversely affected by the body's action. Where a would-be developer has spent $500,000 in an effort to persuade the Board to accept his proposal, and where the public agencies which have the resources to evaluate the proposal and investigate its adverse consequences on other property owners have refused to do so, we say that the due process procedural rights of such property owners have been violated.

Finally as to the merits, we should note that the opposing briefs seriously overstate the holding for which we contend. They claim that we are asserting "the extraordinary proposition" that due process requires zoning bodies "to withhold zoning decisions until they have independently investigated *and reinvestigated,* to the satisfaction of all persons concerned, every ramification of their decisions which offends someone's notions of what is 'acceptable' " (Dev. Br. at 15, emphasis

[10] Exactly such an exhortation was made by one of the present petitioners in a statement which was made to the Board, offered in evidence at the trial, and excluded by the trial court (PX 53 for identification). That evidentiary ruling was challenged on appeal to the Supreme Court of Virginia but summarily upheld (Pet. App. B).

added). Obviously we seek no such holding.[11] We simply say that in the circumstances of this case, where *some* additional professional analysis by the County's professional traffic engineers would have shown the true dimensions of the traffic consequences of the proposed development (as fully demonstrated at the trial below), the Board's approval of the project must be reversed and remanded to allow the Board to decide whether they really want to force the public and these petitioners to live with the real traffic consequences. With respect to the Board-approved Pentagon City development, that is an issue which the Arlington County Board has never faced, and we contend that under the Fourteenth Amendment they must be required to do so now.

II. The Procedural Due Process Issue Raised by This Petition Was Properly Raised Below

The opposing briefs contend that, although the due process issue raised by the petition was properly raised before the trial court (that much seems to be conceded), it was not presented to the Supreme Court of Virginia. We disagree. To go back one step, the original Complaint (properly known as the "Petition for Declaratory Judgment") clearly stated that under the Fourteenth Amendment the Board had an affirmative legal duty to "evaluate" the extent to which the traffic congestion and environmental pollution resulting from the proposed development would adversely affect the prop-

[11] Nor are we claiming (as suggested at Dev. Br. 11) the right "to probe the mental processes of a legislative body." We assert only the right to demand that such a zoning body make some reasonably adequate factual investigation of obvious potential problems before reaching a decision.

erty rights of the plaintiffs and that the Board had violated that constitutional duty (see Pet. at 7-8). Nothing, we submit, could have stated the issue more clearly. And when these petitioners presented their "Assignments of Error" to the Supreme Court of Virginia, their second "assignment" read as follows:

> "2. Was the lower court correct in sustaining the Board's action in approving a rezoning application and a transportation plan without evaluating the dimensions of the traffic and pollution consequences thereof?" (Petition for Appeal at 6).

That "assignment" precisely stated the issue now raised by the petition for certiorari. Moreover, at a later point in the petition addressed to the Supreme Court of Virginia, these petitioners made it explicit that their constitutional claims under the Fourteenth Amendment were "[a]s stated in the Petition for Declaratory Judgment."[12] Since the petitioners believed that a specific Virginia statute imposed upon the Board a duty of "evaluation" which was substantially identical to the duty imposed by the Fourteenth Amendment, the Petition to the Supreme Court of Virginia emphasized the statutory duty, but the fact remains that the constitutional duty was plainly called to the attention of the Supreme Court of the State. In a petition for *leave* to appeal (which is closely akin to a certiorari petition filed in this Court), full legal argumentation is neither expected nor required, and in fact the Board's violation of its duty to evaluate the consequences of its action were spelled out in somewhat unusual detail (see Petition for Appeal at 18-22, 42-45).

[12] Petition for Appeal at 37, n.37.

Finally, as to our opponents' suggestion that the Supreme Court of Virginia had no "decent opportunity" to give the constitutional issue "due consideration" and did not rule on it (Dev. Br. at 2, 3), the short answer is that that court itself, in denying leave to appeal, explicitly stated that it had not only "maturely considered" the petition but had "seen and inspected" the "transcript of the record" (Pet. App. B), which obviously included all of the papers filed below, and on that basis it "affirmed" the decision below (*id.*). In these circumstances, we submit, it cannot seriously be suggested that the court below failed to consider and rule upon the contentions raised here.

CONCLUSION

In view of the novelty and importance of the procedural due process issue presented by the record below, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Petitioners' responses to the "gross distortions" and "fundamental" factual "errors" alleged in the opposing briefs (apart from those dealt with in the body of this brief) are as follows:

(1) Both opposing briefs charge error in the petition's factual discussion (Pet. at 4, Para. 3) of petitioners' standing to maintain this suit (Dev. Br. at 7, Para. 1; Bd. Br. at 3, 8).

As evidence of the harmful effects which the Pentagon City development will have upon their properties, petitioners cited an official report of the Arlington County Board which was published less than three years prior to the Board's approval of the Pentagon City development and which demonstrated that high-density development in the Pentagon City area was already adversely affecting the property interests of home owners in petitioners' neighborhoods (PX 4, Pet. at 4). That report was received with other evidence at the trial to show the standing of petitioners to present their claims. At the conclusion of petitioners' (plaintiffs') case the respondents (defendants) in effect moved to dismiss the claims upon the ground, *inter alia,* that the plaintiffs had not proved the requisite injury, but that motion was *denied* (X at 35). Moreover, during their own case the defendants never presented any evidence to show lack of injury and standing; the issue was left uncontested for the remainder of the trial, and the trial court duly stated in its final opinion that plaintiffs (petitioners) had proved their "right to raise the complaint here" (Pet. App. A at 3a). We simply fail to see in what respect our discussion of the issue in our petition can be regarded as involving "fundamental error".[1]

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[1] Our opponents take comfort in quoting a subsequent statement in the trial court's opinion that "The plaintiffs have not proved in

(2) The developers' opposing brief disputes our characterization of the jammed traffic conditions projected by Mr. Pratt as "unacceptable", pointing out (illogically, in our view) that a particularly gloomy traffic forecast for the metropolitan area suggests that such conditions may become prevalent by 1992 (Dev. Br. at 8-9, Para. 4). In fact, there was *undisputed* testimony that the latter report was overly pessimistic (XXIII at 43-56, 77-82), and the fact that certain calamities have been projected does not mean that they are "acceptable". All of the expert testimony at the trial was to the effect that jammed conditions of the kind forecast by Mr. Pratt are totally unacceptable by the standards of the traffic engineering profession, not to mention the public interest (see, *e.g.*, II at 25-26; XVII at 41-45, 64-66).

(3) The Board's opposing brief suggests that traffic computations of the sort done by Mr. Pratt are really not reliable (Bd. Br. at 9, n.1). In fact the record shows that Arlington County's traffic engineers themselves have found such calculations reliable in the past (XVIII at 6), and the record contains a published scientific study showing that such calculations are not only reliable but, if anything, conservative in predicting future traffic congestion of the type projected here (PX 55; XXII at 33-34).

(4) The developers' brief states flatly that the record shows "a variety of specific means to alleviate" the conditions projected by Mr. Pratt, citing Volume XVII of

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terms of dollars that their specific property interests will be harmfully affected by the increased traffic" (Petit., App. A, page 3a, emphasis added). (See Dev. Br. at 7 and Bd. Br. at 8). It is true that the plaintiffs did not attempt to put a dollar figure on the degree of harm, but of course such a quantification would have been totally unnecessary. Significantly, in relying upon the quoted sentence, our opponents have ignored the immediately preceding paragraph in which the trial court held that the plaintiffs had standing.

the transcript at pages 9-10 and pages 26-27 (Dev. Br. at 9). The cited evidence does not support that statement. The testimony at pages 9-10 of the cited volume does not address the problem of jammed traffic conditions within the proposed development, and the testimony appearing at pages 26-27 has nothing whatever to do with the statements set forth in the developers' brief. Moreover, although the Pratt report indicated that there might be four specific ways by which "congestion potential could be minimized" (see Dev. Br. at 10, and 13, n.8), the County Chief of Transportation Planning subsequently testified that none of Mr. Pratt's "suggestions" would actually alleviate the traffic jams which Pratt had projected (XVII at 99-111).[2] According to this record, there is no way to avoid a total breakdown in the traffic system.

(5) The petition stated that no traffic engineer employed by Arlington County or by the developers ever undertook to make the sort of "back-up" statistical analysis necessary to measure the actual traffic consequences of the three intersectional traffic jams forecast in the Pratt Report (Pet. at 6-7). The opposing brief of the Board states that that representation is "false" (Bd. Br. at 9), saying in response (without record citation) that the County staff "reviewed the development and had no fears for the traffic consequences" (*id.*). The latter ambiguous statement hardly shows the "falsity" of the factual assertions made in the petition. Moreover, only one County traffic analyst prepared any written comments on Mr. Pratt's analysis, and that County employee flatly stated that the traffic congestion would probably be far greater than that forecast by Mr. Pratt (PX 63 at page 2).

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[2] Similarly the opinion of the trial court suggests one specific "thing" that "can be done to alleviate" the projected congestion (Pet. App. A at 7a), but there is no record support for the trial court's suggestion on that score.

(6) In our petition we stated that the photochemical oxidant pollution which will be created by the proposed Pentagon City development will "seriously exacerbate" the air pollutional situation in the area, and that statement is challenged in the developers' opposing brief (at 9, Para. 6). The uncontradicted testimony was to the effect that in 1990 photochemical oxidant levels will be dangerous in any event (XVI at 23, 136-37) and that the development, if constructed, will make the situation even worse (VII at 108-09). We fail to see the error in our statement.

(7) The petition suggested that the trial court evidently "misunderstood" what happened before the Board because the court plainly indicated that there had been a conflict in expert traffic evidence before the Board—which were was not (Pet. at 10). Although the suggestion is cited as a "fundamental error" (Dev. Br. at 7), we note that the developers' brief *concedes* the existence of the misunderstanding, saying only that it "proves" nothing (*i.e.*, is irrelevant) (*id.* at 9-10). We disagree. It goes far to explain the erroneous result reached by the trial court below.